EDITOR'S NOTE

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91-6253

In The
Supreme Court of the United States
October Term, 1991

No. ____

THOMAS CARROLL, Petitioner

vs.

CONSOLIDATED RAIL CORPORATION, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, THOMAS CARROLL, asks leave to file the attached Petition for Writ of Certiorari to the United States Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Petitioner's Affidavit in support of this Motion is attached hereto.

Respectfully submitted,

J. MICHAEL FARRELL, ESQ.
718 Arch Street, Suite 400N
Philadelphia, PA 19106

Attorney for Petitioner

Dated:

In The
Supreme Court of the United States
October Term, 1991

_____

No. ____

_____

THOMAS CARROLL, Petitioner

vs.

CONSOLIDATED RAIL CORPORATION, Respondent.

_____

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

_____

I, THOMAS CARROLLL, being duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give a security therefor; that I believe I am entitled to redress and that the issues which I desire to present on appeal are the following:

1. **Whether the Petitioner stated a cause of action under the Federal Employers Liability Act where he suffered a medically diagnosed major depression with anxiety, obsessive compulsive traits and situational stress response resulting in an inability to continue working, where this impairment is causally related to the prolonged exposure to the work place maintained and operated by the respondent, a railway company?**

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No. I am not presently employed and my last employment was with Conrail on January 9, 1989. My salary at that time was $40,000.00 a year. I am disabled as a result of the work conditions which give rise to this action and receive disability benefits from the United States Railraod Retirement Board.

2. I have received no income since January 9, 1989 from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or any other sources.

3. I have only a joint checking account with my wife who works as a registered nurse and the balance in our joint checking account is approximately $1000.00.

4. I own no stocks, bonds, notes, automobiles, or other valuable property. I own my home which has a market value of approximately 159,000.00 with my wife as tenants by the entirety.

5. I have 2 dependents who depend upon me for support - my 7 year old son David and my 21 year old daughter, Margaret.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Thomas J. Carroll
THOMAS CARROLL

SWORN TO AND SUBSCRIBED TO
before me this 28th day of
August, 1991.

Notary Public

NOTARIAL SEAL
LINDA SHOYER, Notary Public
City of Philadelphia, Phila. County
My Commission Expires June 11, 1994

91-5253

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

THOMAS J. CARROLL,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

J. MICHAEL FARRELL, ESQUIRE
718 Arch Street
Fourth Floor, North
Philadelphia, PA 19106
(215)925-1105

QUESTION PRESENTED FOR REVIEW

The Question presented is:

1) Whether the petitioner stated a cause of action under the Federal Employers Liability Act where he suffered a medically diagnosed major depression with anxiety, obsessive compulsive traits and situational stress response resulting in an inability to continue working, where this impairment is causally related to the prolonged exposure to the work place maintained and operated by the respondent, a railway company?

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In The

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v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPINIONS BELOW

The ORDER and MEMORANDUM of the United States District Court for the Eastern District of Pennsylvania granting respondent's motion for summary judgment was issued on March 7, 1991 and is reproduced at Appendix A-1. The ORDER and OPINION of the United States Court of Appeals for the Third Circuit upholding the District Court's granting of respondent's motion for summary judgment was issued on August 9, 1991 and appears at Appendix A-10.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

The constitutional provisions, statutes and rules of court involved have been set forth in the Table of Authorities.

STATEMENT OF THE CASE

I. Factual Background

Petitioner had maintained long-time employment in the railway industry holding down a variety of jobs with varying degrees of responsibility. From 1986 until January of 1989, he was an assistant chief dispatcher for the respondent, CONSOLIDATED RAIL CORPORATION, with an annual salary of approximately $41,000 plus the ability to occasionally make overtime. Prior to 1986, he had alternated between duties as an assistant chief dispatcher and a train dispatcher.

Petitioner was responsible for monitoring the whereabouts of trains and their freight, issuing directions via radio to railroad yards and train crews, and maintaining records of these actions and the flow of traffic in his station. These duties required petitioner to receive information from approximately a dozen different sources, collate it and process it quickly, and make critical decisions on traffic flow, often instantaneously.

The atmosphere in the office in which petitioner worked was chaotic and extremely stressful. Petitioner has described a situation in which he was continually harrassed and threatened and that the workplace was operated in a totalitarian state which resulted in a sense of continual dread among the employees who constantly feared they would be blamed for some problem regardless of their involvement in it. Petitioner was not permitted to take a single vacation day or even breaks during his work shifts. There was not even sufficient support personnel present to allow him to have a meal. At times, he received directives which ordered him to violate railroad rules, safety procedures and even federal law. In sum, petitioner described a working environment which was maintained and operated by the respondent which simply lacked sufficient support personnel and equipment.

The cumulative effects of the stressful working place revealed themselves on January 9, 1989. On that date, petitioner was required to work in an unfamiliar portion of the office because of a mechanical breakdown with some of the telephone equipment. The office was in a state of pandemonium because of a misdirected train and the ensuing argument that took place. Petitioner left the office several times and went into the hallway in order to escape the chaos inside. Finally, he called an assistant chief dispatcher to replace him and went home, telling his supervisor he was sick. Petitioner has not been able

to return to work since. Dr. Chaefsky diagnosed petitioner as suffering from "major depression with anxiety; obsessive compulsive traits; situational stress response; job as currently set up is unacceptable." See Appendix A-113. Dr. Bernard Albert further concluded that petitioner's "emotionally impoverished state and the attending functional limitations and impairments collectively indicate that he is not in a job-ready state." See Appendix A-135. Dr. Albert went on to describe in more detail the symptomology that resulted from petitioner's illness:

> "Pressures and concerns on the job resulted in a disturbed sleep pattern. In the latter portion of the 1980's he felt increasingly that he would be blamed for some terrible mishap. He began dreading the telephone for fear of bad news. He felt so intimidated he admitted to his reluctance to answer the telephone and secured an answering machine to screen his calls. He also developed the dread of receiving the mail as he was fearful of certified mail indicating charges which would be leveled against him. He began carrying a concealed tape recorder which he used when talking to management personnel. He had a fear of not being accurately or correctly quoted. He began to suffer memory lapses at work and at home. He developed word-finding difficulties. At times he began doubting that he did what he was supposed to at designated times....[He was subjected to] extreme stress."

In short, petitioner, through his testimony and the diagnosis of his medical providers, have factually stated a claim that his severe mental and emotional disability was causally related to an inadequate and unsafe workplace maintained by the respondent.

II. Procedural History

On January 22, 1991, respondent filed a motion for summary

judgment in the United States District Court for the Eastern District of Pennsylvania before the Honorable Donald W. VanArtsdalen to which petitioner responded.

On March 7, 1991, the United States District Court entered a order granting respondent's motion for summary judgment and an appeal to the United States Court of Appeals for the Third Circuit by petitioner followed on March 14, 1991.

On August 9, 1991, the United States Court of Appeals for the Third Circuit issued an opinion upholding the decision of the District Court and this petition for writ of certiorari follows.

ARGUMENT

I. PETITIONER HAS STATED A CAUSE OF ACTION UNDER THE FEDERAL EMPLOYERS LIABILITY ACT WHERE HE SUFFERED A MEDICALLY DIAGNOSED MAJOR DEPRESSION WITH ANXIETY, OBSESSIVE COMPULSIVE TRAITS AND SITUATIONAL STRESS RESPONSE RESULTING IN AN INABILITY TO CONTINUE WORKING.

In its motion for summary judgment, respondent argued that the tort of negligent infliction of emotional distress requires physical contact as a condition precedent to recovery. They urged that there can be no recovery under the F.E.L.A. for emotional injuries that are caused by a negligently maintained work place.

Petitioner contends that this interpretation of the majority rule is erroneous, and that the proofs submitted by petitioner are sufficient to state a cause of action.

A. **Reviewing the Statute**:

A review of the F.E.L.A., the statute which governs the case, provides a starting point in analyzing, petitioner's claims. Section I of the F.E.L.A. 45 USC, subsection 51, provides that "every common carrier by railroad...shall be liable in damages to (employees)...for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier..." Thus the F.E.L.A. views the railroad "as a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any member engaged in the common endeavor". Sinkler v. Missouri Pacific Railroad Co.., 356 U.S. 326, 330, 78 S.Ct. 758, 762 (1958) (emphasis added).

The Act does not propose to define negligence, but rather leaves that task to the common law as announced by the federal courts. Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018 (1949). In deciding questions of negligence, the courts have uniformly recognized that a railway is under a nondelegable duty to provide its employees with a reasonably safe place to work. Nivens v. St. Louis S.W. Ry., 425 F.2d 114 (5th Cir. 1970). As a corollary to this duty to maintain safe working conditions, the carrier is required to provide its employee with sufficient assistance in the performance of the work assigned to him. Blair v. Baltimore & O.R.R., 323 U.S. 600, 65 S.Ct. 545 (1945). Where the failure

to provide sufficient help proximately causes injury to the employee, the carrier is liable for negligence. Deere v. Southern Pac. Co., 123 F.2d 438 (9th Cir. 1941) cert. den'd 315 U.S. 819, 62 S.Ct. 916 (1942). Furthermore, the act does not limit recovery to certain types of injury while excluding others, nor does it limit recovery to damages sustained in a single incident or accident in the work place. In Urie v. Thompson, supra, the Supreme Court noted:

> "We recognize, of course, that when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate railroads. Obviously, these were the major causes of injury and death resulting from railroad operations, but accidental injuries were not the only ones likely to occur. And nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage any injury resulting "in whole or in part from the negligence" of the carrier. If such an intent can be found, it must be read into the Act by sheer inference...
>
> On its face, every injury suffered by an employee while employed by reason of the carriers negligence was made compensable. The wording was not restrictive as to employees covered, the cause of the injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting. To read into this all inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required or the particular sorts of harm inflicted would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this court."
>
> (337 U.S. at 181-82, 69 S.Ct. at 1030)(emphasis added)

B. Searching for the Majority Rule:

As noted above, federal courts are required to apply common law principals in their development of F.E.L.A. jurisprudence. In so *doing*, they often search for the majority common law rule

as it has emerged from state court decisions. A particularly illuminating example of this is Teague v. National Railroad Passengers Corp., 708 F.Supp. 1344 (D.Mass 1989). In that matter, plaintiff claimed that his employer had engaged in a course of conduct that harassed and humiliated him. This stressful condition of employment led him to develop ulcers, duodenitis and chest pain. To put it differently, the plaintiff did not allege a single accident or incident as the precipitating cause but merely alleged a medically diagnosed condition directly attributable to the emotional stress under which he worked. That is precisely the position of the petitioner in the instant case. Given this fact pattern, the Teague Court concluded:

> "The court holds that a review of developments in the state common law, see S. Plotkin, The Evolution of Tort Liability for Psychic Injuries: A Proposal to Protect Relational Interests (1986) (unpublished thesis on file at the University of Virginia School of Law), as well as developments in Supreme Court F.E.L.A. jurisprudence reveal a sufficient claim has been made out. Teague claims that the insults and harassment of his supervisors at Amtrak caused him mental anguish as well as physical ailments. As the Supreme Court has observed, 'While the traditional rule was that a plaintiff could not recover from mental injuries unconnected with actual or threatened impact, the majority of jurisdictions now appear to have abandoned that rule'. Buell, 480 U.S. at 569, n.20, 107 S.CT. at 1418 n.20. Indeed, the present majority rule allows recovery for 'mental distress [when] certified by some physical injury, illness or other objective physical manifestation'. Prosser and Keeton on the Law of Torts, Sec. 54 at 364 (5th Ed. 1984); see, e.g., Payton v. Abbott Labs, 386 Mass. 540, 437 NE 2d. 171 (1982); Restatement (Second) of Torts, Secs. 436, 436A and Comments.

As noted above, both the United States Supreme Court in

Atchison, Topeka & Sante Fe R.Co. v. Buell, 480 U.S. 557, 107 S.CT. 1410 (1987), and Professor Keeton have concluded that a single precipitating event causing an immediate physical injury is not a condition precedent to the tort of negligent infliction of emotional distress. Particularly instructive is Professor Keeton's analysis:

> "Starting with an early Irish decision, the great majority of courts have now repudiated the requirement of impact, regarding as sufficient the requirement that the mental distress be certified by some physical injury, illness or other objective physical manifestation. (Prosser and Keeton, supra, p.364).

In support of this analysis, Professor Keeton refers to Payton v. Abbott Labs, 386 Mass 540, 437 NE 2d. 171 (1982) which is also the standard adopted in Teague as representative of the majority common law rule. In that case, females whose mothers had ingested a cancer-causing drug during pregnancy attempted to recover for their own fear of getting cancer, although none of them had the disease or other symptomology at the time of the suit. The court in denying their claim noted:

> "The Restatement (Second) of Torts Sec. 436A (1965) sets forth what is still the rule adhered to by the majority of American courts: 'If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another and it results in such emotional damage alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance'. The cases generally hold that physical harm is required but (in accordance with the Restatement (Second) of Torts Sec. 436(2)(1965)) the harm need not be caused by impact for trauma; physical harm resulting from emotional stress is sufficient".
>
> (at 552)(emphasis added)

As indicated above, the comments to Sec. 436A of the Restatement (Second) of Torts instructs as to what type of physical harm must be manifested in order to warrant recovery:

> "The rule stated in this Section applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation. The fact that these are accompanied by transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character".
>
> (emphasis added)

A comprehensive review of the majority rule was provided by the Pennsylvania Superior Court in Crivellaro v. Pennsylvania Power and Light Co., 341 Pa.Super. 173 491 A.2d 207 (1985). There the court was faced with a plaintiff seeking damages for "severe emotional distress and related physical trauma including intense headaches, uncontrollable shaking, involuntary hyperventilation and shortness of breath, frequent nightmares, inability to control bowels, upset stomach, and an intense tightening of the muscles in the neck, back and chest which produced severe pain lasting several days following each incident" (491 A.2d at 210). In holding that these injuries were not from the category of wholly mental or emotional, the court stated:

"We are of the view that these alleged injuries are of much greater magnitude than the "transitory, non-recurring physical phenomena" contemplated by Section 436A. We further note that the "bodily harm" alleged herein is equivalent to or surpasses the kind of physical injury deemed by other jurisdictions to be necessary for recovery of damages for negligent infliction of emotional distress. See Haught v. Maceluch, 681 F.2d 291, 299 n.9 (5th Cir. 1982)(under Texas law, depression, nervousness, weight gain, and nightmares are equivalent to physical injury); Gnirk v. Ford Motor Co., 572 F.Supp. 1201 (D.C.S.D., 1983)(depression and insomnia constitute physical injury); D'Amtra v. United States, 396 F.Supp.1180, 1183-84 (D.C.R.I. 1973)("psychoneurosis" or acute depression, constitutes physical injury); Eyrich v. Dam, 193 N.J.Super. 244, 473 A.2d 539 (1984)(excessive drinking, "suicidal" ideation, insomnia, depression, hallucinations constitute physical injury); Corso v. Merrill, 119 N.H. 647, 658 406 A.2d 300, 307 (1979)(depression constitutes a physical injury); Mobaldi v. Board of Regents, 55 Cal.App. 3d 573, 578, 127 Cal. Rptr. 720, 723 (1976)(depression and weight loss constitute physical injury), overruled on other grounds, Baxter v. Superior Court, 19 Cal. 3d 461, 138 Cal.Rptr. 315, 563 P.2d 871, 874 (1977); Hughes v. Moore, 214 Va. 27, 197 S.E. 2d 214, 216, 220 (1973)(anxiety reaction, phobia and hysteria constitute physical injury); Daley v. LaCroix, 384 Mich. 4, 179 N.W. 2d 390, (1970)(weight loss and nervousness constitute physical injury); Toms v. McConnell, 45 Mich.App. 647, 657, 207 N.W. 2d 140, 145 (1973)(depression constitutes physical injury). Thus, we conclude that the physical injury here averred was of sufficient magnitude to sustain a cause of action for negligent infliction of emotional distress....

(491 A.2d at 210-11)

Given the above context, a search for a concise statement of the majority rule is in order. Both the Teague court and Professor Keeton point to Payton v. Abbott Labs, supra, as containing such a statement. That court held:

"We therefore conclude on the basis of the preceding analysis, that in order for any of the plaintiffs to recover for negligently inflicted emotional distress,

she must allege and prove that she suffered physical harm as a result of the conduct which caused the emotional distress. We answer further that a plaintiff's physical harm must either cause or be caused by the emotional distress alleged and that the physical harm must be manifested by objective symptomology and substantiated by expert medical testimony. Finally, the emotional stress for which the compensation is sought must be reasonably foreseeable; unless a plaintiff proves that the defendant knew or should have known of special factors affecting that plaintiff's response to the circumstances of the case the plaintiff can recover only for that degree of emotional distress which a reasonable person that normally constituted would have experienced under those circumstances. Whether the emotional distress which a plaintiff has alleged to have experienced is reasonable is to be determined by the finder of fact.

(at 556-557)

C. The Majority Rule in the F.E.L.A. Context:

With the above state rule in mind, it is now appropriate to look for F.E.L.A. cases similar to petitioner's. Teague, supra is an obvious starting point but available precedent does not end there.

In McMillan v. Western Pacific Railroad Company, 54 Cal. 2d 841, 9 Cal. Rptr. 361, 357 P.2d 449 (1960), the court evaluated an F.E.L.A. claim pressed by a train dispatcher who alleged that the railroad had negligently subjected him to working conditions "of unusual responsibility, stress and tension in that he was required to operate a system of central traffic control of defendant's railroad, which system involved multitudinous and complex mechanical factors and mental decisions, extreme responsibility, constant but shifting attention and numerous clerical functions which imposed an unusual stress and burden

upon plaintiff's physical and nervous systems which caused plaintiff to suffer a severe nervous collapse..." (at 357 P.2d 449). In short, the cause of action asserted in this case is virtually identical to those of the petitioner in the present matter.

In holding that the plaintiff had stated a cause of action under the F.E.L.A., the court analyzed Urie v. Thompson, supra, in detail. They noted that the "injury" in Urie was silicosis, an occupational disease acquired during long term exposure to the work place. it was thus clear that the term "injury" as used in the F.E.L.A. context was not limited to the trauma associated with a sudden accident, but rather was a term that included adverse effects on the employee's health. In particular, the California court noted that portion of Urie supra which states:

> "...where the employers negligence impairs or destroys an employees health by requiring him to work under conditions likely to bring about such harmful consequences, the injury to the employee is just as great when it follows, often inevitably, from a carrier's negligent course pursued over an extended period of time as when it comes with the suddenness of lightning."
>
> (337 U.S. at 186, 69 S.Ct. at 1033)(emphasis added)

Based on this reasoning, the court had no difficulty in holding that a train dispatcher, who suffered a nervous breakdown as a result of the conditions under which he worked, had stated a claim under the F.E.L.A.

In Yawn v. Southern Ry. Co., 591 F.2d 312 (5th cir. 1979), seven clerical workers brought an action under the F.E.L.A.

alleging that the railroad had negligently failed to provide them with adequate help and adequate time within which to do their jobs, thereby causing them to suffer "physical pain, mental anguish and gastrointestinal disturbances" (591 F.2d at 314). While not passing on the issue of the gravity of the plaintiffs' injuries, the court noted that failure of the employer to provide sufficient manpower for the job at hand was negligence sufficient to impose liability under the act. The Court analogized this claim to several F.E.L.A. cases in which a worker was provided with insufficient help to lift a heavy burden and consequently suffered a back injury. See, for example, Southern Ry. v. Welch, 247 F.2d 340 (6th Cir. 1957) and Masiglowa v. New York, C. & St. L.R.R., 135 F. Supp. 816 (N.D. Ohio 1955). the court then noted: "the fact that these employees did not claim to have suffered a back injury back alleged a less substantial physical injury does not require a different result in this case" (591 F.2d at 317).

In Barker v. Consolidated Rail Corporation, CA No. 85-5304, decided January 24, 1986 (Weiner J., E.D.Pa), the court considered the validity of a claim by a train dispatcher that the increased workload placed upon him by his employer contributed to his heart attack. The court noted:

> "Based on the foregoing evidence, we conclude that genuine issues do exist as to whether there was an overload of work, whether the changes in operations and rules were done without consideration of the workload of the train dispatchers, whether the complaints made by the train dispatchers were justified and whether Conrail attempted in any manner to address these complaints. We also conclude that such evidence is sufficient enough to provide a jury

with some rational basis for concluding that some negligence of Conrail proximately contributed to plaintiff's heart attach."

(See Appendix A-12)

The court also faced the argument that the injury to the plaintiff was wholly emotional and, therefore, was not compensable under negligent infliction of emotional distress:

> "Conrail has also cited two cases which hold that there generally can be no recovery for emotional disturbance under the FELA without some precipitating physical injury. Ballard v. Central Vermont Ry., 565 F.2d 193 (1st Cir. 1977); Moody v. Maine Central Railroad Company, C.A. No. 84-0415-P (D.Maine, November 6, 1985). In Ballard, the plaintiff was not allowed to recover for fright and mental anguish resulting from the death of one of his co-workers. In Moody, plaintiff was not allowed to recover for mental anguish resulting from harassment.
>
> In the case sub judice, however, plaintiff does not seek recovery merely for emotional disturbance under the FELA but, on the contrary, seeks recovery for a rather severe physical injury (myocardial infarction). Plaintiff has alleged that the mental pain he has suffered has been the result of this myocardial infarction. Therefore, we do not find the Moody and Bullard cases to be relevant.
>
> (See Appendix A-12)

Similarly, in Welby v. Consolidated Rail Corp., 671 F.Supp. 1015 (M.D.Pa. 1987) an employee claimed that his myocardial infarction resulted from the excessive hours which the railroad required him to work. Again, the court held that this represented a valid claim of injury stemming from an unsafe work place and was thus within the scope of the FELA.

In Amendola v. Kansas City Southern Railway Company, 699 F.Supp. 1401 (W.D.Mo. 1988), the court evaluated a claim that was clearly "wholely emotional", i.e., workers exposed to asbestos

sought recovery for their fears of developing cancer in the future. In denying this claim, the court concluded a review of the development of FELA and emotional injury law that is particularly instructive in the instant case:

> "An important threshold issue to be addressed is whether the FELA even covers the tort of negligent infliction of emotional distress. In answering this question, the court must glean guidance from common law developments. Buell, 107 S.Ct. at 1417. This court finds that the tort of negligent infliction of emotional distress is covered by the FELA because it is clear that a majority of states now recognize the tort...Furthermore, several federal courts have recently found that a claim for the negligent infliction of emotional distress is cognizable under the FELA. See Taylor v. Burlington N.R.R., 787 F.2d 1309 (9th Cir. 1986); Balland v. Central Vermont Ry., 565 F.2d 193 (1st Cir. 1977); Gillman v. Burlington Northern R.Co., 673 F.Supp. 913 (N.D. III. 1987); Halko v. New Jersey Transit Rail Operations, Inc., 677 F.Supp. 135 (S.D.N.Y. 1987). This trend is consistent with the interpretation of the FELA as a "broad remedial statute" requiring a "standard of liberal construction in order to accomplish (Congress') objects."
>
> (699 F.Supp. at 1408)

This court next turned to the issue of whether and under what circumstances physical harm was an element of tortious conduct under the FELA:

> "This court agrees with the rationale in Payton v. Abbott Labs, 386 Mass. 540, 437 N.E. 2d. 171 (1982) and finds that a plaintiff seeking to recover under the FELA for the negligent infliction of emotional distress must introduce evidence that he or she has suffered physical harm as a result of the conduct which caused the emotional distress. The requisite physical harm is not limited to physical injury causing the emotional distress. It is also sufficient if the FELA claimant can establish physical harm caused by the alleged emotional distress. This finding is consistent with the overwhelming weight of authority on the issue. Furthermore, it is in accord with the "common law developments" regarding the tort of the negligent infliction of emotional distress."

(699 F.Supp. at 1410-11)

In Johnson v. Ruark Obstetrics, ____N.C.____, 395 S.E.2d 85 (1990), the North Carolina Supreme Court had the opportunity to survey this area of the law:

> "Our cases have established that to state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress. See, e.g., Bailey v. Long, 172 N.C. 661, 90 S.E. 809 (1916); Green v. Telegraph Co., 136 N.C. 489, 49 S.E. 165 (1904); Young v. Telegraph Co., 107 N.C. 370, 11 S.E. 1044 (1890). Although an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotionable distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice. E.G., Hancock v. Telegraph Co., 137 N.C. 497, 500-501, 49 S.E. 952, 953 (1905). In this context, the term "severe emotional distress" means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."
>
> (395 S.E.2d at 97)

In short, the majority rule as shown above clearly allows recovery for medically diagnosed mental or emotional illness when causally related to the workplace.

D. Applying the Majority Rule to Petitioner's Case

Now that a proper framework has been developed to analyze the petitioner's case, the evidence can be reviewed to determine if the elements of a valid F.E.L.A. claim have been shown. Three questions need to be answered.

1) Did the Respondent negligently maintain an unsafe place to work, making injury to the petitioner a foreseeable consequence?

"An Analysis of the Job of Railroad Train Dispatcher", United States Department of Transportation Report No. FRA-ORD & D-74-37 (relevant portions attached hereto as Appendix A-22 with Affidavit of J. Michael Farrell, Esquire attached hereto as Appendix A-34) notes:

> "Unfortunately, the interests of business and safety are not always compatible. Delays incurred because of excessive caution on the part of the dispatcher cause delays in delivery of goods to customers. Furthermore, delays increase the risks of spoilage of perishables, loss of lading through pilferage, and damage through vandalism. On the other hand, accidents, losses and damage resulting from the breaking of rules to speed up deliveries are also hazards faced by the train dispatcher; so that he often must choose between equally undesirable alternatives in decision-making. Claims are often heard that supervisory pressure is not always in the interests of safety.
>
> Many of the daily decisions made by train dispatchers involve such conflicts. And the decisions must be made almost instantaneously -- there is not time for deliberation, for careful weighing of alternatives...
>
> Most people faced with the necessity of making frequent, quick, unsatisfactory decisions with severe penalties for mistakes become tense and anxious. So the basic nature of the train dispatcher's job is stressful."

Not only is the job of train dispatcher inherently stressful, but the work place and assistance provided by the employer are critical elements in avoiding injury to the worker. The previously cited Department of Transportation report indicates:

"The principal problem affecting the job of train dispatcher today is the continual stress associated with controlling train movements safely and efficiently. The degree of responsibility, the conflict between the interests of safety and good business, the complexity of the operation, and the frequency of occurrence of operational problems keep the dispatcher at an undesirable level of tension and anxiety throughout his work period. This situation is often aggravated by inadequacies in the availability and organization of information, malfunctions and delays in communications, crowded, noisy, uncomfortable and distracting working conditions, the burden of unnecessary duties (particularly paperwork), excessive workload, and conflicting pressures from superiors."

The same report documents the adverse health effects upon the dispatcher:

"Our review of the impact of the job stresses on the train dispatcher's health (Section 5.4.5) suggested that train dispatchers as a group, tend to die younger than the general population in their age group, with the principal causes of death being coronary heart disease and cerebrovascular disorders. Complaint of ulcers and other disabilities associated with anxiety states and fatigue are frequent among train dispatchers. Although more research is needed to substantiate these findings statistically, certain precautions are indicated in the physical evaluation for selection and monitoring of train dispatchers.

Persons with a history of cardiovascular problems or psychosomatic disorders should not be selected for work as train dispatchers. Although these people might function effectively, the chances are high that they stresses of the job would aggravate their conditions and, in the long run, would be detrimental to their well-being."

The petitioner has testified extensively concerning his experience on the job. He has outlined circumstances virtually identical to those discussed in the above cited report. The individual difficulties described by the petitioner are confirmed

in the "1987 Safety Assessment Consolidated Rail Corporation Eastern Region" United States Department of Transportation (attached hereto as Appendix A-101 and 103 with Affidavit of J. Michael Farrell, Esquire):

"Even more disturbing is that the chief dispatcher and the assistant chief dispatcher do not have the electronic capability of monitoring the actions of the dispatchers. Neither is there an inter-communications system between the dispatching desks, the assistant chief dispatcher and the chief dispatcher so instructions and information are shouted across the room.

The required monitoring of Amtrak radio channels and transmissions from the radio-equipped wayside detectors is disruptive. Communication between dispatchers, assistant chief dispatchers and the chief dispatcher is frequently accomplished by shouting across the room.

The dispatching workload at times was excessive to the point that there was an appearance of having made decisions which were not well thought out. Contributing to the workload are procedures which appear to be time consuming and unproductive."

"The office should be equipped with state-of-the-art equipment which will permit intra-office communication and monitoring of dispatching activities.

The workload factors on both desks are sufficiently high to warrant immediate corrective action by Conrail.

Duties not associated with on-track movements should be removed from dispatching responsibility.

There is an insufficient staff of extra-board dispatchers to provide relief for vacations, personal emergencies and sickness."

In summary, government reports have long indicated that the working conditions of train dispatchers are such that adverse health effects are likely. Both the petitioner and later reports

have shown that despite the known risks, the employer continued to maintain the workplace in a condition that made injury likely.

2) Has the petitioner shown that the negligently operated workplace was the cause of his injury?

The petitioner has produced reports from his treating physician indicating the causal link between his present ailment and the conditions under which he worked.

Dr. Robert Chaefsky, M.D., petitioner's treating physician, noted the nature and extent of Mr. Carroll's injury. His diagnosis is "major depression with anxiety; obsessive compulsive traits; situational stress response; job as is currently set up is unacceptable" (See Appendix A-126). The doctor further elaborates on this diagnosis:

> "Anxiety and depression. Obsesses about the pressures of his job. Anxiety dreams persist. Easily overwhelmed. Difficulty with decision making.
>
> Starting early in 1988, Tom had difficulty sleeping, concentrating, memory problems or over-eating. Constant fear that he did something wrong at work as dispatcher for CONRAIL. Almost paranoid regarding phone calls or mail bringing him news of mistake he may have done.
>
> No breaks - even for lunch. Would miss his exit off of Rt. 95 due to preoccupation with problems and pressures. Left work 1/9/89.
>
> (See Appendix A-120)

Dr. Bernard Albert, Ed.D. further elucidated the connection between petitioner's job and his mental disability:

> "Pressures and concerns on the job resulted in a disturbed sleep pattern. In the latter portion of 1980's he felt increasingly that he would be blamed for some terrible mishap. He began dreading the telephone for fear of bad news. He felt so intimidated he admitted to his reluctance to answer the telephone and secured an answering machine to screen his calls. He also developed a dread of receiving the mail as he was fearful of certified mail indicating charges which would be leveled against him. He began carrying a concealed tape recorder which he used when talking to management personnel. He had a fear of not being accurately or correctly quoted. He began to suffer memory lapses at work and at home. He developed word-finding difficulties. At times he began doubting that he did what he was supposed to at designated times. He finally consulted his doctor when his episodes became increasingly frequent in the late 1980's. After consultation with his family physician, he was referred for psychological and then psychiatric consultations. he was placed on medication because of the extreme stress to which he was subjected and instructed to remain off duty. His treatment continued by visit and by telephone."
>
> (See Appendix A-138)

3) Are the injuries shown by the petitioner compensable under the F.E.L.A.?

The answer to this question is already provided by reviewing the symptoms and illnesses outlined in the medical reports quoted in the preceding section, in light of Crivellaro supra and the multi-jurisdictional summary outlined therein. Petitioner has shown a disabling illness, with observable symptoms, and backed by medical diagnosis and opinion. These injuries are, therefore, not of the transitory, minor or speculative nature that can be fairly characterized as "wholly emotional." Lest there remain any question that the medical conditions delineated by appellant are sufficiently physical to warrant compensation, the commentaries to Section 436A of the Restatement of Torts 2nd previously quoted at length resolve the

issue.

II. COMPELLING REASONS JUSTIFYING GRANTING REVIEW

A. This Important Area Under the Federal Employers Liability Act Is Unresolved and There Is a Conflict Among The Circuit Courts of Appeals On the Issue.

As noted above, in Atchison, Topeka & Santa Fe R.Co. v. Buell, 480 U. S. 557, 107 S.CT. 1410 (1987), the court discussed at length the status of the majority rule concerning the tort of negligent infliction of emotional distress. However, it specifically left open the extent to which, and the form in which, that tort was cognizable under the F.E.L.A. As a result, different federal courts have adopted varying approaches to the question. A number of courts have recognized that the tort exists in F.E.L.A. jurisprudence. See Taylor v. Burlington N.R.R., 787 F.2d 1309 (9th Cir. 1986); Ballard v. Central Vermont Ry., 565 F.2d 193 (1st Cir. 1977); Gillman v. Burlington Northern R.Co., 673 F.Supp. 913 (N.D. III. 1987); and Halko v. New Jersey Transit Rail Operations, Inc., 677 F.Supp. 135 (S.D.N.Y. 1987). In addition, a number of courts have adopted the majority rule urged by petitioner in the preceding sections of this brief. See Teague, Yawn, and Amendola, supra.

The Third Circuit has specifically left the parameters of this issue open in Holliday v. Consolidated Rail Corporation, _____F.2d_____, 1990 W.L. 130914 (3rd Cir. 1990). Within the circuit itself various district courts have taken inconsistent positions. For example, in Kraus v. Consolidated Rail

Corporation, 723 F.Supp. 1073 (E.D.Pa. 1989) appeal dismissed 899 F.2d 1360 (3rd Cir. 1990), the court granted a motion for summary judgment in circumstances virtually identical to the ones presented by petitioner. However, in Carlisle v. Consolidated Rail Corporation, No. 88-8752 (E.D.Pa.), another district court denied the railway's motion for summary judgment again in a context indistinguishable from the present case. See Appendix A-144.

In short, the extent to which the tort of negligent infliction of emotional distress is available to railway workers under the F.E.L.A. is a question that remains unresolved. While many courts have adopted the petitioner's view, others have adopted a more restrictive standard or rejected the existence of the tort outright. Many circuits, like the Third Circuit, have left the issue unresolved.

CONCLUSION

Therefore, for the above stated reasons, petitioner respectfully requests that this petition be granted.

DATED this 14 day of October, 1991 at Philadelphia, Pennsylvania.

J. Michael Farrell

J. MICHAEL FARRELL
Attorney for Petitioner